IN THE HIGH COURT OF TRAVANCORE COCHIN.

Before

The Hon'ble Shri K. Sankaran, J u d g e and
" *Shri P.K. Subramania Iyer, Judge.

A. S.No. 16 of 1951.

O.S.No.34 of 1117 of the Parur District Court.

Appellants -- Plaintiffs 1 to 3:-

1. Asia daughter of Athruman of Chollampattu residing in Valiaparambil, Manthenam Kara, Alangad Pakuthy.

2. Ebrayinkutty son of Athruman of do.

3. Athruman Ajeethu of do.

By Advocate Sri P.Narayana Pillai.

Respondent -- 1st defendant:-

Chithomma daughter of Ajeeth of Chollampattu residing at Mangalasseri, Cheranelloor Muri, Kanayannur ~~taluk~~ taluk.

By advocate Sri N.Varadaraja Iyengar.

The above Appeal having been finally heard on 11th November 1953, the Court on the same day delivered the following:-

JUDGMENT.

The 3 plaintiffs who are the appellants are the children of Athrumman, who died in the year 1099, through his second wife who is the 7th defendant. They sued for partition and delivery of their shares in the properties described in three schedules to the plaint, marked A, B and C. The 1st defendant is Athruman's sister and defendants 2 to 6 are the children of his brother Keethian who died in the year 1094. The suit was filed in the year 1117 when plaintiffs 1 and 2 had attained majority but the 3rd plaintiff had not who also attained majority pending suit. During the minority of the plaintiffs, in the year 1100, there was a partition (Ex.I) of all the properties included in the schedules to the plaint. At that partition, the plaintiffs were represented by their mother as guardian. Plaintiffs impeached that partition, inter alia, on the ground that under the Mohammedan Law by which they are governed, the mother is not recognised as guardian and she was, therefore, incompetent to represent them, with the result that Ex.I cannot be regarded as a

transaction to which the plaintiffs were parties. Plaintiffs claim a 5/8 share of items 1 to 4 in the A schedule to the plaint as exclusively belonging to their father. This exclusive claim had not been recognised in Ex.I.

2. The suit was contested by the 1st defendant as also by certain other defendants. Plaintiffs settled their claims with all except the 1st defendant and a compromise petition was presented in court on 2.12.1120 as a consequence of which defendants 2 onwards as also the properties claimed by them were taken out of the ambit of the litigation. What remained in the plaint was the 1st defendant who was in possession of items 1 to 4 of the A schedule and the plaintiffs claim, on the basis of the alleged exclusive title of their deceased father in respect thereof, to a 5/8 share.

3. The court below considered that ≠ on account of the diminution of the scope of the litigation caused by the compromise, the suit became one for partial partition and therefore unsustainable. The court below found too that the partition deed of 1100 which is impeached by the plaintiffs was to the obvious advantage of the plaintiffs and therefore binding upon them notwithstanding the fact that they were not represented by their legal guardian. The court below was of the view that the mother the 7th defendant though not a de jure guardian was a de facto guardian and was entitled as such to represent the minors in a transaction which was, in the court's view, patently to their advantage. In this view, the suit was dismissed by the court below.

4. Learned counsel for the appellants urges before us that Ex.I, the partition deed of 1100, cannot be considered to be a transaction to which the plaintiffs were parties because they were not represented by their de jure guardian. A Full Bench of this Court in 1951 K.L.T.223 held that a transaction by which a minor is sought to be bound but in which that minor is not represented by a de jure guardian,

is void. That case no doubt related to members of the Christian community but the principle laid down therein is, as the case itself shows, equally if not more, applicable to the case of Muslim minors. In A.I.R.1952 Supreme Court 358 it was held that --

"A deed of family settlement to which a Muhammadan minor is a party represented by his brother as de facto guardian is void and not binding on the minor, irrespective of the considerations that it benefitted him or the arrangement was followed for a long period" and that

"A deed of settlement which is thus void qua the minor is void altogether qua all the parties including those who were sui juris."

Ex.I is therefore void and the plaintiffs are entitled to ignore it and claim their reliefs as though such an event never happened. The decision of the court below cannot, therefore, be supported on the ground that to Ex.I the mother of the plaintiffs was a party, nor on the ground, assuming it is correct, that the transaction is obviously to the advantage of the plaintiffs. The other ground relied upon by the court below to dismiss the suit is that on account of the compromise with defendants 2 onwards, the suit has become one for partial partition, which also cannot be sustained. Mulla in his "Principles of Mahomedan Law", 13th edition, 1960, page 33, says:-

"In a suit by an heir for the recovery of his share, the co-heirs are proper parties; but as the interests of the heirs are distinct, the omission to join a co-heir is not a good reason for dismissing the suit."

5. A plea that a suit for partition is bad on the ground that it is one for partial partition which may be a good one in the case of a joint tenancy cannot be upheld in the case of a suit for partition brought by Mohammadan Heirs. The Cochin High Court in XXVI Cochin 153 repelled such a plea. We consider that it is competent for the plaintiffs to claim reliefs against the 1st defendant alone, confining the reliefs to - items 1 to 4 of the A schedule to which the suit got reduced on account of the compromise entered into by the plaintiffs with defendants 2 onwards. The decree of the court below dismissing the suit cannot, therefore, be supported which is -

therefore set aside and the appeal allowed.

6. The court below did not consider the special claim made by the plaintiffs as regards items 1 to 4 in the A schedul. That claim has to be considered and for its consideration we remand the case to the court below after setting aside the decree passed by that court. If the plaintiffs establish either that the 5/8 claimed by them or any other fraction of the rights over items 1 to 4 in the A schedule belonged exclusively to their deceased father, then the special rights that they are entitled to would be decreed to them. It would be competent for the 1st defendant to urge pleas in answer to this special claim. It would be open for the 1st defendant to apply in the court below to bring on record any or all the parties who were originally there, should that be necessary for protecting her interests in the properties dealt with at the partition in the year 1100. Costs here and hitherto as between the plaintiffs and the 1st defendant upon the reduced litigation, that is the litigation that there is after the compromise, will be costs in the cause and will be provided for by the lower court in its revised decree minus the court fee paid in this appeal which will be refunded to the appellants. The other costs incurred will be costs thrown away.

11th November 1953.

Sd/- K. Sankaran, Judge.
Sd/- P.K.Subramania Iyer, Judge.

/True copy/

Asst.Registrar for Registrar.

Copy of Judgment.

A.S.16 of 1951.

Compared by
V K Lakshmanan Pillai